No. 18-966

IN THE

Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,

Petitioners,

v.

NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the Second Circuit

Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners

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QUESTION PRESENTED

1. Whether the district court erred in enjoining the Secretary of Commerce from reinstating a question about citizenship to the 2020 decennial census on the ground that the Secretary's decision violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*

2. Whether, in an action seeking to set aside agency action under the APA, a district court may order discovery outside the administrative record to probe the mental processes of the agency decisionmaker—including by compelling the testimony of high-ranking Executive Branch officials—without a strong showing that the decisionmaker disbelieved the objective reasons in the administrative record, irreversibly prejudged the issue, or acted on a legally forbidden basis.

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Interest of Amicus Curiae[1]

The Public Interest Legal Foundation, Inc., (the "Foundation") is a non-partisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation's mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. The Foundation also seeks to ensure that voter qualification laws and election administration procedures are followed. Specifically, the Foundation seeks to ensure that the nation's voter rolls are accurate and current, working with election administrators nationwide and educating the public about the same. The Foundation's President and General Counsel, J. Christian Adams, served as an attorney in the Voting Section at the Department of Justice. Mr. Adams has been involved in multiple enforcement actions under the Voting Rights Act and has brought numerous election cases relying on Census population data. Additionally, one of the members of the Foundation's Board of Directors, Hans von Spakovsky, served as counsel to the assistant attorney general for civil rights at the Department of Justice, where he provided expertise in enforcing the Voting Rights Act and the Help America Vote Act of 2002, as well as a commissioner on the Federal Election Commission. The Foundation believes that this brief—drawing from the expertise

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were notified and have consented to the filing of this brief.

of the Foundation's counsel and the Foundation's experience itself—will aid in the Court's consideration of the Petition.

SUMMARY OF ARGUMENT

Collecting robust citizenship data on the 2020 Census will help enforce the Voting Rights Act. The U.S. Census Bureau made the careful determination that the citizenship question be included on the decennial Census once again, as it has many times in the past. Just last month, the U.S. District Court for the Southern District of New York "vacate[d] Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire." Petition Appendix ("App.") 352a. The district court erred. This error, if not corrected by this Court before the deadline for the printing of the Census forms, will have long-lasting effects. The opportunity to collect the data on the 2020 Census, once gone, cannot be reclaimed. This "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11.

ARGUMENT

The Secretary's reinstatement of the citizenship question resulted in six challenges in three different courts across the country. The lower court was the first of the three courts to issue a decision on the merits. The lower court's decision came as a trial on two other challenges was wrapping up in California, *State of California, et al. v. Ross, et al.*, 18-cv-01865 (N.D. Cal. filed Mar. 26, 2018) and *City of San Jose, et al. v. Ross, et al.*, 18-cv-02279 (N.D. Cal. filed Apr. 17, 2018), and shortly before a trial on two additional

challenges began in Maryland, *Kravitz, et al. v. United States Dep't of Commerce, et al.*, 18-cv-01041 (D. Md. Filed Apr. 11, 2018) and *La Union Del Pueblo Entero, et al. v. Ross, et al.*, 18-cv-01570 (D. Md. filed May 31, 2018).

Time is running out to include the citizenship question in the Census. This case presents questions both of the utmost national importance as well as a question with a fixed and rapidly shrinking timeframe for resolution. This rare urgency strongly supports Petitioners.

I. The Reinstatement of the Citizenship Question on the 2020 Census Is of National Importance.

To the households receiving the Census survey, the citizenship question is merely one simple question among many. To those seeking to enforce the Voting Rights Act, that one simple question provides critically important data that is not available elsewhere.

The reinstatement of the citizenship question resulted in multiple cases across the country. The four cases not presently before this Court are still pending and awaiting decisions on the merits. The plaintiffs in these actions are myriad, ranging from states to private organizations. Some plaintiffs in the litigation pending before these other district courts are advocating that the court issue findings that go further than the lower court did in this case. For example, the plaintiffs in *California v. Ross* seek the consideration of extra-record evidence in the court's findings. Plaintiffs' Post-Trial Proposed Conclusion of Law at 32, *State of California, et al. v. Ross, et al.*, No. 18-cv-01865 (N.D. Cal. filed Feb. 1, 2019) ("The Court may

consider extra-record evidence relevant to Plaintiffs' claims that the Secretary's decision was based on pretext.") The questions presented in the Petition are of national significance.

II. The Court's Immediate Guidance Is Needed.

Time is of the essence. The Petitioners have told this Court that the Census forms need to be finalized for printing by the end of June 2019. Petition at 14. The opportunity to collect citizenship data on the 2020 Census, once lost, can never be rectified. As the lower court acknowledged, the Census "has massive and lasting consequences...with no possibility of a do-over." Pet. App. 11a-12a. The court anticipated further review and issued "a comprehensive record in order to facilitate higher court review and to minimize any potential need for a remand." Pet. App. 12a.

This Court has the opportunity to correct this wrong. If the lower court's decision stands, it will impact at least a decades-worth of Voting Rights Act enforcement. There will also be an uncorrectable ripple effect into the future if this critical data from the 2020 Census is not collected as it will serve as a comparison point for future Census findings.

CONCLUSION

The petition for writ of certiorari before judgment should be granted.

Respectfully submitted,

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